Supreme Court, U.S.
FILED
SEP 11 1996
CLERK

(3)

No. 96-54

In the Supreme Court of the United States

OCTOBER TERM, 1995

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 28, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CITY OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

C. GREGORY STEWART
General Counsel
GWENCOLYN YOUNG REAMS
Associate General Counsel
VINCENT J. BLACKWOOD
Assistant General Counsel
KAREN M. MORAN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

19 pp

QUESTIONS PRESENTED

1. Whether petitioner was improperly held in contempt for failing to meet its membership goal.

2. Whether the district court abused its discretion in ordering a change in the membership goal to take into account changes in the labor pool.

3. Whether petitioner was correctly held partially responsible for the inequality in the number of hours worked by its nonwhite and white journeypersons.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Local 28, Sheet Metal Workers v. *EEOC*, 478 U.S. 421 (1986) 3, 9, 12, 13

Mackin v. *City of Boston*, 969 F.2d 1273 (1st Cir. 1992), cert. denied, 506 U.S. 1078 (1993) 12

United States v. *City of Miami*, 2 F.3d 1497 (11th Cir. 1993) 13, 14

Statute:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 2

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 96-54

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 28, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CITY OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 81 F.3d 1162. The opinion of the district court (Pet. App. 43a-178a) is reported at 889 F. Supp. 642.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1996. The petition for a writ of certiorari was filed on July 9, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1971, the United States filed suit against petitioner, alleging that petitioner had discriminated against blacks and Hispanics (nonwhites) seeking admission into its union, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* Pet. App. 6a-7a. The Equal Employment Opportunity Commission (EEOC) later replaced the United States as plaintiff, *id.* at 6a n.1, and respondent City of New York intervened as a plaintiff, *id.* at 46a. After a trial, the district court found in favor of plaintiffs and issued an Order and Judgment (O&J) requiring petitioner to end its discriminatory practices. *Id.* at 7a-8a. The court also ordered petitioner to achieve a 29% nonwhite membership goal by July, 1, 1981. *Id.* at 7a. Based on the proposals of a court-appointed administrator, the court adopted an affirmative action plan which was designed to assist petitioner in eliminating its discriminatory practices and their continuing effects. *Id.* at 8a. The plan included stringent record-keeping requirements. *Ibid.*

The court of appeals affirmed the district court's liability determination and affirmed the district court's remedial measures with some modifications. Pet. App. 9a. On remand, the district court adopted a revised affirmative action plan to incorporate the court of appeals' modifications, and the court of appeals affirmed. *Ibid.*

In 1982 and 1983, the district court held petitioner in contempt for thwarting the achievement of the membership goal and failing to maintain proper records. Pet. App. 9a. To remedy petitioner's contempt, the district court ordered petitioner to make payments to a training fund and to keep computerized

records. *Ibid.* In an Amended Affirmative Action Plan & Order (AAAPO), the court also raised the nonwhite membership goal to 29.23%, and required the selection of one nonwhite apprentice for every white apprentice selected. *Id.* at 9a-10a. The court of appeals affirmed the finding of contempt and most of the remedial measures, including the membership goal. *Id.* at 10a. The court set aside the requirement that petitioner indenture one nonwhite for every white apprentice. *Ibid.* This Court affirmed, specifically rejecting petitioner's contention that the membership goal violated Title VII and the Constitution. *Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 475-481 (1986) (opinion of Brennan, J.); *id.* at 483-489 (Powell, J., concurring in part and concurring in the judgment). The Court held that the district court had authority to adopt race-conscious measures to remedy petitioner's long and egregious history of discrimination, and that the membership goal was narrowly tailored to achieve that end because it was administered as a benchmark for measuring petitioner's progress in eliminating discrimination, rather than as a fixed quota. *Ibid.*

2. In 1993, the City of New York initiated the current proceedings when it moved to hold petitioner in contempt for failing to comply with the O&J and the AAAPO. Pet. App. 10a. The City alleged that petitioner had violated those orders by: (1) discriminating against nonwhites in referring members to contractors for job opportunities, (2) failing to invoke provisions in the collective bargaining agreements that could have created a more equitable distribution of hours worked between whites and nonwhites, (3) failing to make substantial progress in meeting its membership goal, (4) adopting a discriminatory

reinstatement policy for members terminated for failure to pay dues, and (5) failing to comply with the recordkeeping requirements. *Id.* at 10a-11a. The City submitted affidavits to support those allegations. *Id.* at 11a. After negotiations to settle the dispute broke down, petitioner filed papers opposing the contempt motion and submitted evidence in support of that opposition. *Ibid.*

In February 1995, the district court held petitioner in contempt and adopted a series of measures to remedy that contempt. Pet. App. 43a-150a. The court found that petitioner had continued its long history of "failing to provide and maintain accurate records as required by the O&J and the AAAPO." *Id.* at 58a. The court found that petitioner's recordkeeping had been "irresponsible and sloppy at best, and purposefully deceptive at worst" (*id.* at 59a), that petitioner had engaged in a pattern of undercounting its white members and overcounting its minority members (*id.* at 66a), and that petitioner's recordkeeping violations reflected petitioner's unwillingness to comply with the affirmative action plan. *Id.* at 65a.

The court also found "clear and convincing evidence that [petitioner] has failed to achieve [its] membership goal." Pet. App. 71a. The court viewed petitioner's failure to meet the goal "as a symptom of its refusal to stop discriminating against nonwhites in admission to the union and in the provision of equal job opportunities," and it based its contempt finding "on this discrimination [and] not on the failure to meet the membership goal." *Id.* at 75a-76a.

The court specifically found that there was a significant disparity between the number of hours worked by white and nonwhite journeypersons, and that petitioner was partially responsible for that

disparity. Pet. App. 84a-88a. The court found that petitioner had violated prior orders by failing to invoke two provisions in its collective bargaining agreement that could have increased job opportunities for nonwhite journeypersons: one provision gave petitioner the power to require a Manpower Committee to attempt to place members in jobs; the other provided for the establishment of a mandatory two-week furlough system. *Id.* at 84a-85a. The court also found that petitioner's business agents had discriminated against nonwhite members by refusing to assist them in finding work to the same extent as they assisted white members. *Id.* at 86a-88a. The court found that, while petitioner's business agents routinely assisted white members, they assisted nonwhite members "only sporadically—just before a union election, or after they reported a violation of the [Collective Bargaining Agreement], for example." *Id.* at 87a. The court concluded that petitioner's failure to assist nonwhite members in finding work led to a reduction in the percentage of nonwhite members, since members who cannot find work often leave the union. *Id.* at 93a.

The court further found that petitioner discriminated against nonwhites by adopting a policy that precluded members who failed to pay dues for more than two years from rejoining the union. Pet. App. 91a-93a. The court found that petitioner's policy "ha[d] the effect, if not purpose, of discriminating against nonwhites in their readmission to the union." *Id.* at 92a. The court also found that petitioner applied its reinitiation policy in a discriminatory manner, denying nonwhites "the opportunity to reenter the union because of the high unemployment rate, while

their white counterparts have been able to rejoin." *Id.* at 95a.

The district court imposed a series of new injunctive and monetary measures in order to remedy petitioner's contempt. Of relevance to the present petition, the district court directed the parties to recalculate petitioner's membership goal to take into account petitioner's recent demerger with Local 10 and the 1990 census. Pet. App. 150a.[1]

3. The court of appeals affirmed the district court's finding of contempt and its order to recalculate the membership goal. Pet. App. 1a-42a. The court of appeals first rejected petitioner's contention that the district court had improperly held petitioner in contempt for failing to meet the 29.23% membership goal. The court of appeals noted that the district court did not rely on petitioner's failure to meet the goal as an independent basis for imposing contempt, but merely used it "as a piece of evidence from which to infer continuing discrimination." *Id.* at 15a. The

---

[1] The district court also ordered petitioner to provide back-pay to certain nonwhite journeypersons, to make additional contributions to the training fund, and to modify the reinitiation policy. At the request of the City and petitioner, the court ordered petitioner and the contractors who employ its members to initiate a job rotation and hiring hall system. Pet. App. 27a. The court of appeals vacated the back-pay order and remanded for an award that is limited to victims of petitioner's discrimination (*id.* at 28a-30a); it approved the order to make additional contributions to the fund, without prejudice to later challenges to the amount (*id.* at 30a-31a); it affirmed in part and reversed in part the modifications to petitioner's reinitiation policy (*id.* at 31a-32a); and it reversed the imposition of the hiring hall and job rotation system (*id.* at 33a-38a). The present petition does not raise any question concerning those remedial measures.

court of appeals did not reach petitioner's argument that even that limited reliance on petitioner's failure to meet the goal was impermissible, because the court of appeals concluded that the district court's finding of contempt was fully justified on other grounds. *Id.* at 15a.

In particular, the court of appeals affirmed the district court's finding of contempt based in part on petitioner's recordkeeping violations. The court found that "[t]he errors here were not mere clerical mistakes, but instead tend to demonstrate that [petitioner] has systematically attempted to undercount white membership and overcount nonwhite membership." Pet. App. 16a.

The court also affirmed the district court's finding of contempt based on petitioner's contribution to the disparity between white and nonwhite members in the number of hours worked. Pet. App. 17a-24a. The court concluded that the district court's finding of a disparity in hours worked was "well supported by the evidence." *Id.* at 19a. The court also concluded that the evidence was sufficient to support the district court's finding that petitioner contributed to that disparity. The court noted that there was evidence that petitioner's business agents had provided little or no assistance to nonwhite members in finding jobs, and it concluded that the district court was entitled to credit that evidence rather than petitioner's conflicting evidence, particularly in light of petitioner's long history of resisting court orders and petitioner's submission of misleading records on its membership. *Id.* at 20a. The court also determined that the discrimination of petitioner's business agents had a significant effect. Although business agents affected only two percent of the hours worked, "[t]he hours

worked by [petitioner's] journeypersons in the average year is in the millions." *Id.* at 22a.

The court of appeals also affirmed the district court's finding of contempt based on petitioner's failure to invoke provisions in the collective bargaining agreement that could have helped unemployed members to obtain work. Pet. App. 22a-23a. Although petitioner asserted that invoking the provisions would not have been effective, the court concluded that the provisions had some promise of working, and that there was no evidence that they would not have been effective. *Id.* at 22a-23a. The court also concluded that the O&J required petitioner to attempt to alleviate the disparity in hours worked, even if such efforts ultimately proved unsuccessful. *Id.* at 23a-24a.

The court of appeals also affirmed the district court's finding that petitioner's adoption of its revised reinstatement policy constituted contempt. The court of appeals concluded that the evidence was sufficient to support the district court's finding that the policy had an impermissible discriminatory effect on nonwhites. Pet. App. 25a. Having reached that conclusion, the court saw no need to address the question whether petitioner applied the policy in a discriminatory manner. *Ibid.*

Finally, the court of appeals affirmed the district court's order to recalculate the membership goal in order to take into account the demerger of petitioner and Local 28 and the shifts in population reflected in the 1990 census. Pet. App. 32a-33a. The court of appeals stated that, "[b]ecause it is undisputed that large shifts in [petitioner's] membership have occurred since the goal was last modified, the [district] court's decision to recalculate the goal was proper." *Ibid.* The court rejected petitioner's contention that

the membership goal was an unconstitutional quota, concluding that "[t]his issue was litigated earlier in this case, and the Supreme Court has made clear that the membership goal is just that—it is just a goal and is not a quota." *Id.* at 33a.

ARGUMENT

1. Petitioner contends that the district court held it in contempt based on its failure to meet its 29.23% membership goal, thereby transforming the goal that this Court upheld in 1986 into an impermissible quota. Pet. 13-18. That contention is without merit and does not warrant this Court's review.

Contrary to petitioner's contention, the district court did not hold petitioner in contempt based on petitioner's failure to meet the membership goal. Instead, the court treated petitioner's failure to meet the goal as one piece of evidence tending to demonstrate that petitioner was engaged in ongoing discrimination. Pet. App. 75a-76a. The district court expressly stated that it viewed petitioner's failure to meet the goal "as a symptom of its refusal to stop discriminating against nonwhites in admission to the union and in the provision of equal job opportunities to journeypersons, and it is on this discrimination, not on the failure to meet the membership goal, that the contempt finding is based." *Ibid.* The district court's limited reliance on petitioner's failure to meet the goal was entirely appropriate. See *Sheet Metal Workers*, 478 U.S. at 478 (opinion of Brennan, J.) (approving use of goal as a benchmark against which the court could gauge petitioner's efforts to remedy discrimination); *id.* at 484-489 (Powell, J., concurring in part and concurring in the judgment) (same).

In any event, petitioner has sought review of the court of appeals' judgment, and the court of appeals affirmed the district court's finding of contempt and its adoption of new remedial measures without relying in any way on petitioner's failure to meet its membership goal. The court of appeals stated that "although we affirm the district court's contempt finding * * * we do so by relying on grounds other than the union's failure to attain the membership goal." Pet. App. 15a. The court of appeals specifically relied on petitioner's recordkeeping violations, petitioner's failure to provide equal employment opportunities to its white and nonwhite members, and petitioner's adoption of a discriminatory reinitiation policy. *Id.* at 15a-26a. Because the court of appeals affirmed the district court's judgment of contempt without placing any reliance on petitioner's failure to meet its membership goal, the first question raised by petitioner is not presented here.

2. a. Petitioner next contends (Pet. 18-21) that the district court lacked authority to order a change in the membership goal to take into account the most recent census figures concerning the labor force in New York City. According to petitioner, it has not discriminated against nonwhites for the past 10 years, and the sole purpose of altering the membership goal is to keep pace with demographic changes over which it had no control. For that reason, petitioner contends, the district court's order to modify the membership goal conflicts with the principle that the equitable authority of federal courts is limited to remedying conditions caused by unlawful discrimination, and may not be used to correct conditions caused by other sources. Pet. 19-20 (citing decisions of this Court establishing that principle). Petitioner's argu-

ment is without merit. Petitioner has continued to engage in discrimination over the past 10 years, and the modification in the membership goal is reasonably tailored to assist in remedying that discrimination.

The premise of petitioner's argument—that it has not engaged in discrimination in the past 10 years—ignores the district court's findings in this case. The district court specifically found that, since the adoption of the membership goal in 1983, petitioner actively discriminated against nonwhites in referring its members for available work. Pet. App. 86a-88a. Because members who cannot find work are likely to leave the union, petitioner's discriminatory referral practices had the effect of reducing the percentage of nonwhite journeypersons. *Id.* at 93a. The district court also found that petitioner adopted a discriminatory reinitiation policy that prevented a disproportionate number of nonwhites from rejoining the union. *Id.* at 91a-93a. The court of appeals affirmed those findings, *id.* at 20a-21a, 24a-26a, and those fact-bound determinations raise no issue warranting this Court's review.

The district court's order to modify the membership goal was an appropriate response to petitioner's ongoing discrimination. Because the district court was seeking to remedy petitioner's ongoing discrimination, and not simply discrimination that occurred prior to 1983, the district court reasonably decided that the membership goal should be modified to reflect the labor pool from which petitioner currently draws its members, rather than the labor pool from which petitioner drew its members in 1983. As the district court concluded (Pet. App. 76a-77a, 143a), the current labor pool is different from the labor pool that existed in 1983 for two reasons. First, as a result of its

demerger from Local 10, petitioner now draws its members only from the New York City area, rather than the New York City/New Jersey area as it did in 1983. Second, the percentage of nonwhites in the New York City labor pool has increased since 1983. *Id.* at 76a-77a, 143a. To remedy petitioner's ongoing discrimination, the district court appropriately ordered a modification in the membership goal to reflect those changes.

The district court's decision to modify the membership goal so that it reflects the current labor pool, rather than an outdated one, is entirely logical. If the percentage of nonwhites in the labor pool had declined dramatically, the district court surely would have had authority to lower the membership goal to take that change into account. See *Mackin* v. *City of Boston*, 969 F.2d 1273, 1276 (1st Cir. 1992), cert. denied, 506 U.S. 1078 (1993). By the same token, in assessing petitioner's progress in eliminating ongoing discrimination, it makes sense to take into account the greater availability of nonwhites in the labor pool. *Ibid.*

The district court's modification is also consistent with the history of this litigation and with petitioner's own position in the district court. As this Court noted in *Sheet Metal Workers*, the membership goal was recalculated in 1983 when the relevant labor pool changed as a result of the merger of petitioner with Local 10. 478 U.S. at 437, 441. Moreover, in the district court, petitioner agreed that the recent demerger of petitioner from Local 10 made a new membership goal appropriate. Pet. App. 76a-77a. The same logic supports the district court's adjustment in the goal to take into account the impact that demographic changes have had on the qualified labor pool.

Finally, petitioner's contention that the court's modification holds it accountable for demographic changes over which it had no control ignores the court of appeals' holding that the membership goal is a benchmark to assist in assessing whether petitioner has eliminated discrimination, rather than an end in itself. Pet. App. 32a-33a; see also *Sheet Metal Workers*, 478 U.S. at 478 (opinion of Brennan, J.); *id.* at 487-488 (Powell, J., concurring in part and concurring in the judgment). If petitioner eliminates all of its discriminatory practices and their effects, it can obtain a dissolution of all outstanding orders, regardless of whether it has reached the modified membership goal.

b. Petitioner errs in contending (Pet. 20-21) that the decision below conflicts with *United States* v. *City of Miami*, 2 F.3d 1497 (11th Cir. 1993). There, the City of Miami had engaged in affirmative action in filling firefighter positions for 15 years under a consent decree, and there was no evidence that the City engaged in any new discrimination after entry of the decree. Asserting that the City had cured the effects of its past discrimination, the union sought to dissolve the decree. The district court refused to dissolve the decree, because the City had not reached its long-term goal of achieving a workforce that was representative of the local labor force. The court of appeals reversed and remanded, holding that the failure to reach the long-term goal should not by itself preclude termination of the decree. *Id.* at 1507-1508. The court stated that "[i]f there is work force disparity that cannot be attributed to past discriminatory practices of the City of Miami, such disparity is no reason for keeping in force this consent decree." *Id.* at 1508.

The situation here is entirely different. The district court found that petitioner had continued to engage in discrimination since the entry of the court's last remedial order; and the court premised its new remedial order on that ongoing discrimination, not on petitioner's failure to meet the membership goal. Moreover, nothing in the decision below precludes petitioner from seeking dissolution of the decree, including the revised membership goal, once it has ceased discriminating and has remedied the effects of its prior discrimination. There is therefore no conflict between the decision below and *City of Miami*.

3. Petitioner asserts (Pet. 22-29) that it was held in contempt for the disparity in hours worked between whites and nonwhites, even though the contractors were entirely responsible for that disparity. The courts below determined, however, that petitioner was partially responsible for the disparity in hours worked. In particular, the courts below determined that petitioner's business agents discriminated against nonwhites in referring members for available work, and that petitioner had failed to invoke provisions in the collective bargaining agreement that could have provided more job opportunities for nonwhite members. Pet. App. 17a-24a, 84a-88a. Petitioner was properly held in contempt for those contributions to the disparity in hours worked.

Petitioner contends (Pet. 27-29) that the evidence shows that its agents did not engage in discrimination, and that invoking the collective bargaining provisions would not have resulted in any additional work for nonwhites. Those fact-bound contentions do not warrant this Court's review. Indeed, petitioner itself recognizes that this Court "does not sit to

review factual issues, especially where two lower courts have concurred in the resolution of such issues." Pet. 29.

Petitioner contends, however, that the court of appeals applied too lenient a standard of review when it affirmed the district court's findings that petitioner contributed to the disparity in hours worked, and that the application of that lenient standard effectively eviscerated the requirement that a finding of contempt must be based on clear and convincing evidence. Pet. 26-27. That contention is without merit. The court of appeals in this case stated that "the clearly erroneous standard is more stringent when * * * review[ing] the district court's finding of contempt, which must be found by clear and convincing evidence, not just by a preponderance of the evidence." Pet. App. 21a. Applying that more rigorous standard, the court of appeals concluded that the district court's findings were not clearly erroneous. The court stated that "we cannot say that we are left with any conviction, let alone a definite and firm one, that the district court erred." *Ibid.* Petitioner's contention that the court of appeals did not apply a sufficiently rigorous standard of review is therefore incorrect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

C. GREGORY STEWART
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

KAREN M. MORAN
Attorney
Equal Employment Opportunity Commission

SEPTEMBER 1996